Supreme Court, U.S.
FILED
MAR 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1176

In the Supreme Court of the United States

OCTOBER TERM, 1985

MORRIS I. COHEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Carter v. *Commissioner*, 645 F.2d 784 4

Estate of Power v. *Commissioner*, 736 F.2d 826 4

Faulconer v. *Commissioner*, 748 F.2d 890 4

Groetzinger v. *Commissioner*, 771 F.2d 269, petition for cert pending, No. 85-1226 5

Snyder v. *United States*, 674 F.2d 1359 3-4

United States v. *Gilmore*, 372 U.S. 39 3

Constitution, statute and regulation:

U.S. Const. :

Amend. IV 4

Amend. V 4

26 U.S.C. 162 ..... 2, 3

Treas. Reg. § 1.183-2(b) 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1176

MORRIS I. COHEN, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner challenges the court of appeals' holding that his alleged business expenses did not qualify for a tax deduction because they did not arise from an activity engaged in for profit.

1. The facts, as found by the Tax Court,[1] are as follows. Petitioner was employed from 1942 to 1963 by the United States Department of Labor (48 T.C.M. (CCH) 5 (1984)). In 1963, at the age of 48, he retired on disability and enrolled in law school (*id.* at 5-6). In 1967, after graduation and admission to the Indiana State Bar, he sought to establish a law practice in Indianapolis as a sole practitioner (*id.* at 6). Between 1967 and 1970, he represented two clients, one of

---

[1]The Tax Court's memorandum decision is unofficially reported at 48 T.C.M. (CCH) 5 (1984). Because petitioner has not reprinted the Tax Court's findings of fact in the appendix to his petition, we will refer to the appropriate pages of the unofficial report.

whom paid him a fee of $5,000 (*ibid.*). Between 1970 and 1973, he had a small number of potential clients referred to him by the Indianapolis Bar Association; the income that he received as a result of these referrals, if any, was minimal (*ibid.*). Petitioner received no further referrals from the Indianapolis Bar Association after 1973, and he thereupon concluded that he would be unable to establish a successful law practice (*ibid.*). He reported no income from the practice of law during the tax year at issue or during the immediately preceding tax years (*ibid.*).

On his federal income tax return for 1980, petitioner deducted various items under Section 162 of the Code[2] as ordinary and necessary expenses allegedly incurred in the "trade or business" of practicing law. These items included one-half of the rent on his four-room apartment, expenses connected with two lawsuits in which he was a plaintiff, the cost of a listing in the white pages of the telephone book, the cost of a subscription to the Burns Indiana Annotated Statutes, and kitchen utensils and clothing (48 T.C.M. at 6; Tr. 37-41, 50).

The Commissioner on audit disallowed the claimed deductions, and petitioner sought redetermination of the resulting deficiency in the Tax Court. That court noted the well-settled rule that a taxpayer is entitled to claim business-expense deductions in connection with an activity only if he shows that "he engaged in [that] activity with an honest and bona fide objective of making a profit" (48 T.C.M. at 7). The court observed that the question whether a taxpayer has a genuine profit-making motive is "a question of fact" (*ibid.*), and it held that petitioner had failed to carry his burden of proof on that score (*id.* at 8). Specifically, the

---

[2]Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.), as amended (the Code or I.R.C.).

court found "no evidence in the record that petitioner did legal work for any clients * * * or spent any time on legal work" during the relevant years, and it found that he had "received no income from the practice of law during those years" (*ibid.*). The court further found that petitioner had engaged in no activity calculated to attract clients or to produce income as an attorney, and it accordingly concluded that he had abandoned any law practice that he may once have had (*id.* at 8, 9). The court determined a deficiency in petitioner's income tax for 1980 in the amount of $1,149 (Pet. App. C1).[3]

The court of appeals affirmed in an unpublished judgment order (Pet. App. A2-A4). It held that "the Tax Court correctly determined that petitioner did not carry his burden of proof regarding the deductibility of [his] alleged business-related expenses" (*id.* at A3). The court noted that petitioner had proffered a miscellany of other arguments, arguments that it had considered and found "to be without merit" (*ibid.*).

2. It is well established that an expense is not deductible under Section 162 unless it is attributable to an activity engaged in by the taxpayer with the objective of earning a profit. *E.g., United States* v. *Gilmore,* 372 U.S. 39, 46 (1963) ("[T]he only kind of expenses deductible [under the predecessor of Section 162] are those that relate to a 'business,' that is, profit-seeking, purpose."); *Snyder* v.

---

[3]The Commissioner also sought to establish a deficiency in petitioner's income tax for 1978 by seeking to disallow petitioner's claimed net operating loss carryover from 1977 (48 T.C.M. at 6-7). The Tax Court resolved this question in petitioner's favor, finding that the Commissioner had failed to preserve the issue in his notice of deficiency, in his pleadings, or at trial (*id.* at 9-10). The only other matter raised in the notice of deficiency, concerning the proper calculation of petitioner's disability income exclusion for 1978-1980, was resolved by stipulation of the parties after trial (*id.* at 5 n.1).

United States, 674 F.2d 1359, 1363-1364 (10th Cir. 1982); *Faulconer* v. *Commissioner*, 748 F.2d 890, 892-894 (4th Cir. 1984); *Estate of Power* v. *Commissioner*, 736 F.2d 826, 828-830 (1st Cir. 1984). The question whether a taxpayer has a genuine profit-seeking objective is essentially one of fact. *Carter* v. *Commissioner*, 645 F.2d 784, 786 (9th Cir. 1981). The Treasury Regulations set forth guidelines for making this factual determination. Treas. Reg. § 1.183-2(b).[4]

Here, petitioner essentially conceded that he abandoned any hope of profiting from the practice of law when he ceased having business referred to him by the Indianapolis Bar Association in 1973. See 48 T.C.M. at 6. As the Tax Court found, petitioner thereafter did not "hang out his shingle" (*id.* at 8) and spent no time performing legal work. These factual findings were amply supported by the record, and the court of appeals correctly determined that petitioner failed to show them clearly erroneous.[5]

---

[4]The Regulations provide that, in determining whether an activity is engaged in for profit, all the facts and circumstances with respect to the conduct of the activity are to be taken into account, including (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any, which are earned; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation inherent in carrying on the activity.

[5]Petitioner in this Court seems to have abandoned his contention that the Tax Court's factual findings were clearly erroneous, confining his petition mainly to a congeries of Fourth and Fifth Amendment claims. Only one of these claims merits any response. Petitioner asserts that the parties' post-trial stipulation in the Tax Court (see Pet. App. B1-B4) showed him as having no tax due for 1980, and hence contends that the Commissioner was estopped to assert any tax deficiency for 1980 stemming from disallowance of petitioner's business-expense (or "Schedule C") deductions. See Pet. 11, 17-18. The post-trial stipulation, however,

3. Although petitioner does not raise the point, we note that the "trade or business" question decided by the courts below is unrelated to the question presented by the government's petition for certiorari in *Groetzinger* v. *Commissioner*, 771 F.2d 269 (7th Cir. 1985), petition for cert. pending, No. 85-1226. The question there is whether a full-time gambler, who concededly engaged in wagering activities with the intent to earn a profit, can properly be deemed to be in a "trade or business" for tax purposes despite the fact that he does not hold himself out to others as offering goods or services for a price. Because the courts below found as a fact that petitioner did not have the requisite intent to make a profit, and hence that he was not engaged in a "trade or business" for that reason, those courts had no need to consider, and did not consider, whether a taxpayer must offer "goods or services" in order to qualify for trade-or-business status. There is, of course, no doubt that legal services qualify as "goods or services," when offered with the intent to earn a profit. The disposition of the instant petition thus does not depend upon the Court's resolution of the circuit conflict involved in *Groetzinger*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1986

---

expressly preserved that issue for decision after trial, stating that the computations set forth in the stipulation covered only the other issues in the case and "d[id] not reflect [the Commissioner's] disallowance of Schedule C expenses * * * for 1980" (Pet. App. B1). The court of appeals thus correctly rejected petitioner's contention that the Commissioner by virtue of the post-trial stipulation "ha[d] admitted the deductibility of the business expenses" (Pet. App. A3).